

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JOSEPH LOCHUCH EWALAN,

Plaintiff,

v.

WASHINGTON STATE  
DEPARTMENT OF  
CORRECTIONS, et al.,

Defendants.

CASE NO. C20-5678JLR-TLF

ORDER

**I. INTRODUCTION**

Plaintiff Joseph Lochuch Ewalan, a prisoner proceeding *pro se* and *in forma pauperis*, has previously moved for appointment of pro bono counsel on three separate occasions. (*See* 1st Mot. to Appoint (Dkt. # 7); 2d Mot. to Appoint (Dkt. # 46); 3d Mot. to Appoint (Dkt. # 115).) The court denied each motion. (*See* 10/09/20 Order (Dkt. # 31); 4/29/21 Order (Dkt. # 74); 10/17/22 (Dkt. # 121).) For the reasons set forth below, the court *sua sponte* reconsiders Mr. Ewalan's most recent request for appointment of

1 counsel and now concludes that extraordinary circumstances support the appointment of  
2 counsel in this case. The court conditionally GRANTS Mr. Ewalan's third motion for  
3 appointment of pro bono counsel, contingent on the identification of counsel willing to  
4 represent Mr. Ewalan pro bono in this matter.

## 5 **II. BACKGROUND**

6 This is a 42 U.S.C. § 1983 civil rights action brought by Mr. Ewalan, an inmate at  
7 the Washington State Penitentiary. (*See* Compl. (Dkt. # 5); Dkt.) Mr. Ewalan alleges  
8 that, while he was confined at the Stafford Creek Corrections Center ("SCCC"), he was  
9 twice assaulted by other inmates on July 16, 2017 and October 4, 2019. (*See* Compl. at 5,  
10 10.) Mr. Ewalan accused Defendants of failing to protect him from these assaults despite  
11 prior notice. (*See id.*) The court granted summary judgment in favor of Defendants  
12 Washington State Department of Corrections, SCCC, and SCCC employees Robert  
13 Schreiber, Sergeant Arlee Rothwell, Tammy Nikula, Kendra Wakefield, and Sergeant  
14 Denny Larsen with respect to all but two of Mr. Ewalan's claims. (*See* 12/8/21 Order  
15 (Dkt. # 85).) Specifically, the court identified a dispute of material fact with respect to  
16 whether: (1) Mr. Schreiber and Sgt. Rothwell failed to protect Mr. Ewalan from the July  
17 2017 assault; and (2) Ms. Wakefield and Sgt. Larsen failed to protect Mr. Ewalan from  
18 the October 2019 assault. (*Id.* at 15-18.)

19 In its order on Defendants' summary judgment motion, the court also denied  
20 Defendants' motion to dismiss Sergeant Russell Dickerson for failure to perfect service  
21 and allowed Mr. Ewalan additional time to serve Sgt. Dickerson with a copy of the  
22 summons and complaint. (*Id.* at 9, 20.) After Sgt. Dickerson ultimately returned a

1 waiver of service, Mr. Ewalan filed a motion for default against Sgt. Dickerson (Mot. for  
 2 Default (Dkt. # 107)); *see also* 10/6/22 Order (Dkt. # 120) at 2-3), which the court denied  
 3 (10/03/22 (Dkt. # 119)).<sup>1</sup> Mr. Ewalan’s claim that Sgt. Dickerson failed to protect him  
 4 from the July 2017 incident despite prior notice therefore also remains unresolved. (*See*  
 5 12/8/21 Order.)

### 6 III. ANALYSIS

7 The court first reviews the legal standard for appointing pro bono counsel in civil  
 8 rights litigation before turning to Mr. Ewalan’s motions for appointment of counsel.

#### 9 A. Legal Standard for Appointment of Counsel

10 There is no constitutional right to appointed counsel in a § 1983 action. *Storseth*  
 11 *v. Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981); *see United States v. \$292,888.04 in*  
 12 *U.S. Currency*, 54 F.3d 564, 569 (9th Cir. 1995) (whether to grant a request for counsel in  
 13 section 1983 cases is “discretionary, not mandatory”). However, in “exceptional  
 14 circumstances,” a district court may request counsel for indigent civil litigants pursuant to  
 15 28 U.S.C. § 1915(e)(1). *Rand v. Roland*, 113F.3d 1520, 1525 (9th Cir. 1997), *overruled*  
 16 *on other grounds*, 154 F.3d 952 (9th Cir. 1998).

17 Because there is no right to counsel in a civil case, the Court does not have  
 18 authority to compel counsel to provide representation. *Mallard v. United States Dist.*

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19  
 20 <sup>1</sup> After opposing Mr. Ewalan’s motion for default, the Washington State Attorney  
 21 General (the “AG”) sought to withdraw as counsel for Sgt. Dickerson, citing an inability to  
 22 contact its client. (Mot. to Withdraw (Dkt. # 110).) The court denied the AG’s motion without  
 prejudice to allow it more time to successfully contact Sgt. Dickerson and advise him of its intent  
 to withdraw. (*See* 10/6/22 Order at 5.) The AG has not subsequently sought to withdraw as  
 counsel for Sgt. Dickerson. (*See* Dkt.)

1 | *Court*, 490 U.S. 296, 298 (1989). Instead, the Court may only “request” that counsel  
2 | serve. 28 U.S.C. § 1915(e)(1); *U.S. v. 30.64 Acres of Land*, 795 F.2d 796, 801 (9th Cir.  
3 | 1986) (noting that § 1915 only permits a court to “request” counsel, not to compel  
4 | representation). Nor may the court appoint publicly funded counsel, such as the Federal  
5 | Public Defender. “The Supreme Court has declared that ‘the expenditure of public funds  
6 | [on behalf of an indigent litigant] is proper only when authorized by Congress.’” *Tedder*  
7 | *v. Odel*, 890 F.2d 210, 211 (9th Cir. 1989) (citing *United States v. MacCollom*, 426 U.S.  
8 | 317, 321 (1976)). Congress has not provided funds to pay counsel secured under 28  
9 | U.S.C. § 1915(e). *See 30.64 Acres of Land*, 795 F.2d at 801. Accordingly, the court is  
10 | limited to making a request for pro bono counsel to provide voluntary representation.

11 |         The decision to request pro bono counsel rests within “the sound discretion of the  
12 | trial court and is granted only in exceptional circumstances.” *Agyeman v. Corrections*  
13 | *Corp. of Am.*, 390 F.3d 1101, 1103 (9th Cir. 2004). A finding of exceptional  
14 | circumstances requires an evaluation of both the likelihood of success on the merits and  
15 | the ability of the plaintiff to articulate his claims *pro se* in light of the complexity of the  
16 | legal issues involved. *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). Neither of  
17 | these factors is dispositive; instead, the court must view both factors together. *Wilborn v.*  
18 | *Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986).

19 |         If the court determines that extraordinary circumstances warrant appointment of  
20 | counsel, it will direct the Clerk of the Court to identify an attorney from the Pro Bono  
21 | Panel who is willing to represent the plaintiff in accordance with this District’s Pro Bono  
22 | Plan. *See* General Order No. 16-20, Section 4(b) (Dec. 8, 2020). Only after such an

1 attorney is identified will the court issue an order appointing him or her to represent the  
2 plaintiff. *See id.*

3 **B. Mr. Ewalan's Motions for Appointment of Counsel**

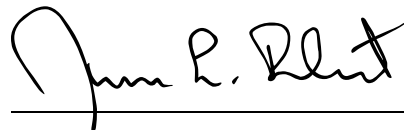
4 The court previously denied Mr. Ewalan's most recent motion to appoint counsel  
5 because it concluded that Mr. Ewalan had failed to demonstrate that his circumstances  
6 were "exceptionally different from the majority of the challenges faced by *pro se*  
7 litigants." (10/17/22 Order at 3 (quoting *Siglar v. Hopkins*, 822 F. App'x 610, 612 (9th  
8 Cir. 2020)).) The court also deemed it too early to decide whether Mr. Ewalan was likely  
9 to succeed on the merits of his case. (*Id.* at 4.)

10 Since the court issued its order denying Mr. Ewalan's third request for  
11 appointment of counsel, however, the case has advanced toward trial. (*See Dkt.*) At this  
12 time, the court cannot definitively determine Mr. Ewalan's likelihood of success on the  
13 merits, but several of his claims have survived summary judgment and will be resolved  
14 through settlement or at trial. (*See* 12/8/21 Order.) Additionally, Mr. Ewalan has  
15 asserted that he faces additional difficulty litigating his case *pro se* because of a traumatic  
16 brain injury. Mr. Ewalan asserts that he has had lasting impacts from the injury, which  
17 could have also impacted his cognitive capabilities. (*See* 2d Mot. to Appoint at 2-4.) On  
18 further consideration of Mr. Ewalan's third motion, the court believes that appointment of  
19 pro bono counsel may be appropriate in light of the legal questions to be resolved at trial  
20 and the impacts of Mr. Ewalan's brain injury.

#### IV. CONCLUSION

For the foregoing reasons, the court conditionally GRANTS Mr. Ewalan's third motion to appoint counsel (Dkt. # 115), contingent on the Clerk of the Court's identification of counsel willing to represent Mr. Ewalan in this matter. The court DIRECTS Clerk of the Court to seek counsel to represent Mr. Ewalan, in accordance with the court's Pro Bono Plan. If an attorney is willing to represent Mr. Ewalan pro bono, the court will issue appropriate appointment orders.

Dated this 7th day of February, 2023.

A handwritten signature in black ink, appearing to read "James L. Robart", written over a horizontal line.

JAMES L. ROBART  
United States District Judge